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No. 85-637

In the Supreme Court of the United States

OCTOBER TERM, 1986

DONALD P. HODEL, SECRETARY OF THE INTERIOR, APPELLANT

v.

MARY IRVING, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE APPELLANT

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REPLY BRIEF FOR THE APPELLANT

Appellees do not dispute—indeed, they specifically endorse (see Br. 2, 35)—the account in our opening brief (U.S. Br. 2-9) of the historical background and deleterious consequences of the fragmented ownership of allotted lands on the Nation's Indian reservations. Section 207 of the Indian Land Consolidation Act of 1983[1] and the 1984 amendments thereto[2] represent a carefully tailored response by Congress to the most extreme forms of the fractionated ownership problem.

Appellees do not appear to take issue with our basic submission (U.S. Br. 24-36) that, as applied to Indian tribes generally, Section 207 constitutes a valid exercise by Congress of its plenary power over the transfer, descent, and distribution of property held in trust for the benefit of Indians and does not result in an unconstitutional taking of property. Appellees do argue (Br. 12-24), however, that the Sioux, unlike all other Indians affected by the allotment policy, obtained from the United States an absolute contractual right to have their property descend to designated heirs, either by intestacy or devise. In appellees' view, the decedent owners of the fractional interests at issue in this case succeeded to the same absolute right, and

[1] Pub. L. No. 97-459, 96 Stat. 2519, 25 U.S.C. 2206.

[2] Pub. L. No. 98-608, § 1(4), 98 Stat. 3172, 25 U.S.C. (Supp. II) 2206.

any action by Congress that adversely affects that right—even under vastly changed circumstances almost a century after the initial allotment—is unconstitutional.[3]

Appellees evidently take the position that Congress is powerless to take *any* steps to stem the ever-increasing fractionation of ownership of allotted lands, and thereby to maximize the benefit of those lands for the Indians, unless it exercises the power of eminent domain and purchases the fractional interests involved. Nothing in the special Sioux Allotment Act suggests that it was intended to place Congress in such a constitutional straightjacket. In these times of budgetary constraints, that interpretation could lead to still further fractionation of ownership for the indefinite future on the Pine Ridge, Rosebud and other Sioux Reservations. Before explaining why the Sioux Allotment Act cannot be read to require that anomalous result, we shall first place the Indian Land Consolidation Act in its proper historical perspective and correct appellees' mischaracterization of the effect of that Act.

1. The Act of March 2, 1889, ch. 405, 25 Stat. 888 *et seq.*, which provided for the division of the Great Sioux Reservation into six reservations and for the allotment of those separate reservations to individual Indians, was a particular application of the allotment policy that commenced on a broad scale with the General Allotment Act of 1887, ch. 119, 24 Stat. 388 *et seq.* See *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 589-590 & n.6 (1977); *Mattz* v. *Arnett*, 412 U.S. 481, 497 & n.19 (1973). It was anticipated when the General Allotment and Sioux Allotment Acts were passed that allotted parcels would pass out of trust status into fee ownership by the Indian allottee or his immediate heirs after the 25-year trust period specified in Section 5 and

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[3] Appellees do not challenge the court of appeals' holding (J.S. App. 4a-11a) that as potential heirs and devisees, they had no constitutionally protected right to *receive* the fractional interests involved and that Congress therefore was free, insofar as they are concerned, to change the laws of descent before any property passed. U.S. Br. 14-16, 26-27. Appellees therefore have abandoned their principal submission in the court of appeals. By contrast, appellees did not rely below on an asserted vested right of the *decedent* to pass property at death, which was the basis of the court of appeals' decision. Cf. J.S. App. 12a-13a n.11.

Section 11 of those Acts, respectively. 24 Stat. 389; 25 Stat. 891. It was further anticipated that any surplus unallotted lands owned by the tribes would be sold to the government and opened to non-Indian settlement (§ 5, 24 Stat. 389; § 12, 25 Stat. 892), and that Indian tribes and reservations would dissolve as individual Indians were assimilated into non-Indian society. See, *e.g.*, *Solem* v. *Bartlett*, 465 U.S. 463, 466-469 (1984).

Appellees are wrong in asserting (Br. 36) that "it was Congress' allotment policy that caused the fractionated heirship problem" and that Congress's efforts to address that problem through Section 207 of the Indian Land Consolidation Act should be held to constitute a taking for that reason. If the allotment policy had unfolded as planned, the Sioux reservations would no longer exist, most land that once was within the Great Sioux Reservation would no longer be in Indian ownership, and the fractionated heirship problem to which Congress responded in the Indian Land Consolidation Act of 1983 would never have arisen. But events did not unfold as planned. The trust periods for allotted lands were extended—at first temporarily,[4] and then permanently by Section 2 of the Indian Reorganization Act of 1934 (IRA), ch. 576, 48 Stat. 984, 25 U.S.C. 462. Correspondingly, most reservations were not disestablished, and tribes did not disappear. In fact, the revitalization of Indian tribes and their reservations were among the central purposes of the IRA. Those purposes were to be accomplished by, inter alia, prohibiting any further allotment of tribal lands (§ 1, 25 U.S.C. 461); restoring surplus unallotted lands to tribal ownership (§ 3(a), 25 U.S.C. 463(a)); authorizing the acquisition of additional lands to be held in trust for the benefit of Indians (§ 5, 25 U.S.C. 465); and prohibiting the transfer or descent of Indian lands except to tribal members, their lineal descendants, and other Indians (§ 4, 25 U.S.C. 464).

The fractionated ownership of allotments thus is the result not of the allotment policy itself, but instead of subsequent actions taken by Congress to undo the deleterious consequences of

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[4] See, *e.g.*, Act of June 21, 1906, ch. 3504, 34 Stat. 325; *Oglala Sioux Tribe* v. *Hallett*, 708 F.2d 326, 330 (8th Cir. 1983); 5 Kappler, *Indian Affairs, Laws & Treaties* 642, 667, 680-681 (1941).

that policy, by, inter alia, retaining allotments in trust status for the benefit of succeeding generations of Indians. Section 207 of the Indian Land Consolidation Act was intended to address this inevitable by-product of Congress's repudiation of the allotment policy; and like that repudiation, Section 207 was enacted for the benefit of the Indians. Section 207 therefore is not the sort of statutory provision that suggests a requirement that compensation must be made *to* the Indians in order for it to be given effect.

b. Absent legislation such as Section 207, ownership of allotments inevitably would become more fragmented with each passing generation. The consequence would be to exacerbate the various problems created by fractionated ownership: a complex mix of interests in allotted tracts, the inability to put land to its most economic use, quasi-abandonment of some tracts, devaluation of individual interests, an absence of a personal nexus to and responsibility for the land, and the substantial burden borne by the Bureau of Indian Affairs (BIA) in administering allotments in such a condition. See U.S. Br. 5-9. These consequences adversely affect not only the owners of a particular tract, but also the entire reservation community. Land is central to the history, culture and economic well-being of most Indian tribes, and Congress accordingly has sought in the IRA and subsequent legislation to strengthen the reservation system and to foster economic development and self-determination for Indians within that framework. The increasingly fragmented ownership of individual tracts of allotted lands undermines those endeavors because of its enervating effect on the economic, cultural, and spiritual life of the reservation. These considerations, none of which are denied by appellees, impelled Congress in 1983 to intervene and arrest the most extreme forms of fragmented ownership. Compare *Texaco, Inc.* v. *Short*, 454 U.S. 516, 529-530 & n. 23 (1982); *United States* v. *Locke* No. 83-1394 (Apr. 1, 1985), slip op. 2, 21. This good faith undertaking by Congress should not lightly be overturned.[5]

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[5] Appellees "concede that a public purpose was envisioned by Congress in consolidating these fractionated interests and reducing the administrative costs of the government" (Br. 35), and they apparently also concede the legitimacy

2.a. Appellees' submission also rests on an erroneous conception of Section 207 of the Indian Land Consolidation Act. Contrary to the impression created by appellees' brief, Section 207 does not unilaterally and immediately appropriate all Indian allotments to the ownership and use of the government. Of course, in the narrow circumstances in which it operates, Section 207 does transfer the ownership of an interest in an allotment from its owner to another party (the Indian tribe concerned); and we may assume that the transfer of ownership by operation of law typically would constitute a taking of property within the meaning of the Fifth Amendment. See Appellees' Br. 31-33. But the critical distinguishing fact in this case, which appellees ignore, is that the escheat to the tribe under Section 207 occurs at a time when *some* transfer of ownership must occur in any event, by virtue of the death of the prior owner.

Significantly, moreover, such dispositions at death have always been subject to the [redacted] power of the legislature to regulate the descent and distribution of property by intestacy or devise, including the power to designate the heirs to whom property will descend. See U.S. Br. 24-28. In any given case, such a law might direct the disposition of property to persons other than those whom the decedent might have chosen. But that consequence of governmental regulation in this area has never been though to constitute a "taking" of the property involved. Appellees' contrary argument—that the operation of Section 207 must be viewed not as a regulatory measure but as

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of those objectives (see Br. 28, 33). See also Sisseton-Wahpeton Amicus Br. 3-4, 9-10. Appellees do question whether they personally will benefit from the "reciprocity of advantage" discussed in our opening brief. See U.S. Br. 18-19, citing *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922), and *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 139-140 (1978) (Rehnquist, J., dissenting). But appellees properly acknowledge that the Court's review in this regard is " 'limited to determining that the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that objective.' " Br. 35, quoting *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1015 n.18 (1984). Here, Congress rationally could determine that, especially over time, individuals who have interests subject to escheat will realize some reciprocity of advantage from the escheat of interests owned by others.

the constitutional equivalent of a physical seizure of property that automatically gives rise to a taking claim (see Br. 29-32)—would effectively eliminate the authority of Congress and the state legislatures to regulate the disposition of property at death. Compare *Hawkins* v. *Barney's Lessee*, 30 U.S. (5 Pet.) 457, 467 (1831) ("It is argued, that [statutes of] limitation * * * indirectly * * * effect a complete divesture [*sic*] and even transfer of right. This is unquestionably true, and yet in no wise fatal to the validity of [the] law.").

b. Appellees also fail to appreciate the carefully circumscribed and flexible nature of the regulatory approach embodied in Section 207 and the alternatives to escheat by which an owner can assure that his interest will remain in individual ownership. As an initial matter, Section 207 applies only to what Congress reasonably determined were de minimis interests in allotments—those interests that represent 2% or less of the allotment and are capable of earning less than $100 annually. In addition, the Act does not interfere with the benefits of ownership during the owner's lifetime, including his right to share in the income from the allotment or to convey his interest by sale or gift. If the owner does sell his interest, the *proceeds* of course may descend by intestacy or devise. In that event, Section 207 would have had the effect only of preventing the descent of the fractional interest *in kind*. See U.S. Br. 9-10, 34-35. Such a transformation of an interest in real property into its equivalent in money is not an unconstitutional taking of property. Nor does a covered de minimis interest automatically escheat to the tribe even if the owner has not disposed of it by the time of his death. The owner may avoid that result by partitionment or by acquiring additional interests in the same allotment during his lifetime. And under the amended version of Section 207, the owner may devise his interest to another owner of an interest in the same allotment. 25 U.S.C. (Supp. II) 2206(b); U.S. Br. 34-35.[6]

[6] In an effort to permit still further flexibility, and in deference to tribal self-government, the 1984 amendments also authorize Indian tribes to adopt ordinances that provide for alternative dispositions of covered interests in a way that will avoid further fragmentation (25 U.S.C. (Supp. II) 2206(c))—*e.g.*, by providing for such an interest to descend by intestacy to another owner of an interest in the same tract even if the owner has not left a will that so stipulates.

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Thus, far from inflexibly mandating the transfer of all covered interests to the government, as appellees imply, Section 207 creates an incentive for an owner of a de minimis interest to arrange his own affairs so as to ensure the retention of that interest in individual ownership after his death, but to do so in a way that furthers the important public purpose of preventing further fragmentation of ownership. Compare *United States* v. *Locke*, slip op. 21.[7] The "escheat" feature of Section 207 simply has the effect of designating the tribe concerned as the statutory heir of the interest if the owner declines to make any other arrangements. That designation constitutes "nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property, real or personal[,] within its dominion may be trans-

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[7] In many instances the owner of a relatively insubstantial interest in an allotment might be content to have that interest pass to the tribe rather than to be further subdivided among his heirs or devisees, at least if he understood that similar interests in other allotments on the reservation would likewise escheat and thereby occasion a reciprocity of advantage. Even in this case, there is no firm indication that any of appellees' decedents objected (or would have objected) to the operation of Section 207. Appellees assert (Br. 3) that decedent Cross "did in fact attempt to preserve for her five minors her trust property interests" by executing a will one week before her death. That will, however, refers to Cross's "worldly goods" and specifically mentions only her house in Nebraska; it does not mention her interests in allotments on the Pine Ridge and Rosebud Reservations in South Dakota. See Complaint, Exh. D.

In an apparent effort to marshal equitable considerations against Section 207, appellees discuss (Br. 3-5) the 15 fractional interests in allotments on the Pine Ridge Reservation that were owned by decedent Cross and escheated to the Oglala Sioux Tribe pursuant to Section 207. However, appellees' examples serve only to illustrate the compelling need to arrest the fragmentation of ownership. Absent escheat, those 15 interests—6 of which had no appraised value and generated no income (J.A. 24-25)—would have been subdivided among Cross's five minor children. As a result, each child would have had less than a 0.4% interest in the allotments concerned; the annual income to each child from the nine subdivided interests that have any value would have ranged between $0.18 and $10.22; and the appraised value of those interests would have ranged between $14.22 and $56.67 (J.A. 22-24). By any measure, these are insubstantial interests in real property. Yet under appellees' submission, Congress was constitutionally barred from preventing this division of Cross's interests, and indeed will be compelled to permit still further fragmentation when her children die.

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mitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it." *Mager* v. *Grima*, 49 U.S. (8 How.) 490, 492-493 (1850); U.S. Br. 25-28. Such a regulatory measure does not constitute a "taking" of property within the meaning of the Fifth Amendment. See *United States* v. *Locke*, slip op. 23 ("Regulation of property rights does not 'take' private property when an individual's reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed.").[8]

c. The foregoing discussion sufficiently answers appellees' assertion (Br. 19, 25) that Section 207 converts the decedent's interest from a fee interest to a life estate. A life estate is a possessory interest of fixed duration, measured by the lives of one or more persons. L. Simes & A. Smith, *The Law of Future Interests* 50 (2d ed. 1956). By contrast, a fee interest is of potentially infinite duration. *Id.* at 47. Section 207 does not limit the duration of a fractional interest to the life of its owner. As we have explained, the owner may convey his fee interest during his lifetime, in which event the fee will pass unimpaired and survive the death of the prior owner. And under the amended version, the owner of a covered fractional interest may devise it to another owner of an interest in the same tract. Accordingly, this case bears no relation to the dictum in *Choate* v. *Trapp*, 224 U.S. 665, 674 (1912), upon which appellees rely (Br. 25), that a statute "which reduced [the allottee's] fee to a life estate" would be invalid.

Appellees also err in contending (Br. 29-30) that Section 207's focus on a narrow category of de minimis interests is irrelevant because the magnitude of the property interest is not dispositive in determining whether a "taking" has occurred. Appellees rely on *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436-437 (1982). But as the Court stressed (*id.* at 434-435,

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[8] Viewed another way, if the owner does not take steps to avoid escheat, it may be presumed that he has effectively abandoned his interest or is prepared to have it so treated when he dies. Compare *United States* v. *Locke*, slip op. 13-15, 18-19; *Texaco, Inc.* v. *Short*, 454 U.S. 516, 526-528 (1982); *Hawkins* v. *Barney's Lessee*, 30 U.S. (5 Pet.) 457, 466-468 (1831).

436-437), *Loretto* involved an actual physical invasion. By contrast, where, as here, the challenged governmental action is regulatory in nature, the Court has made clear that one of the important factors to be considered is the "economic impact of the regulation." See, *e.g.*, *Connolly* v. *Pension Benefit Guaranty Corp. (PBGC)*, No. 84-1555 (Feb. 26, 1986), slip op. 12-13; *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978). The insubstantial nature of the affected property interests therefore is clearly relevant to the taking inquiry in this case.[9]

For similar reasons, and contrary to appellees' contention (Br. 31-32), it is relevant as well that an interest affected by Section 207 passes to the tribe rather than to the United States. As we have explained (U.S. Br. 31-32), this "character of the governmental action" (*Connolly* v. *PBGC*, slip op. 13) confirms that the role of Section 207 is to adjust benefits and burdens in order to promote the general welfare of the reservation community, not to accomplish a direct invasion of the property, either by the Federal Government itself (see *Penn Central*, 438 U.S. at 124) or by non-Indians who would completely deprive the Indians of their beneficial interest (compare *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 414-417 (1980)). This feature of Section 207 therefore ensures that it substantially furthers the United States' trust responsibility to the Indians. Compare *Sioux Nation*, 448 U.S. at 407-409, 414-417.

3. Appellees argue, however, that although Section 207 of the Indian Land Consolidation Act may be valid as a general matter, it is unconstitutional as applied to allotments on the reservations that were carved out of the Great Sioux Reservation by the Act of March 2, 1889. Appellees read the 1889 Act as a "bargain" that confers on the original Sioux allottees and every succeeding generation of their descendants a perpetual

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[9] For this reason, there is no merit to appellees' contention (Br. 34) that if Section 207 is not held to effect a taking, "then there is no safeguard to prevent Congress from increasing the percentage of the interest in the tract from 2% to 5% to even 100%." The very nature of the "ad hoc, factual inquiry" mandated by this Court (see *Connolly* v. *PBGC*, slip op. 13) would require a different balancing if the interests involved were more substantial and the ownership of the tract were correspondingly less fragmented.

and absolute contractual right to pass their property at death to whomever they choose, free even from the sort of reasonable regulation prescribed by Section 207 of the Indian Land Consolidation Act. See Br. 12-29, 37. Like the court of appeals (J.S. App. 7a-8a, 16a), appellees apparently rely (see Br. 12, 21-22) on the language in Section 11 of the Sioux Allotment Act that provides, upon the death of the original allottee, for the land to be held in trust for the allottee's "heirs" under state law (25 Stat. 891). There are numerous flaws in appellees' contention that the quoted term was intended to confer a permanent contractual right to be free of what appellees concede (Br. 9) to be "Congress' usual authority to regulate the descent and distribution of Indian property."

a. This Court has held that "absent some clear indication that the legislature intends to bind itself contractually, the presumption is that a 'law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.' " *National Railroad Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. 451, 466 (1985), quoting *Dodge* v. *Board of Education*, 302 U.S. 74, 79 (1937). See also *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, No. 85-521 (June 19, 1986), slip op. 10-11. That presumption may be overcome only if Congress's intent to confer vested or contractual rights is "clearly and unequivocally expressed" (*National Railroad Passenger Corp.*, 470 U.S. at 466).

The Sioux Allotment Act contains no "clearly and unequivocally expressed" intent on the part of Congress to contract away its plenary authority to enact laws regulating the transfer, descent, and distribution of property held by the United States in trust for the Indians. Such a notion in fact is refuted by the text of Section 11 of that Act, which is virtually identical to Section 5 of the General Allotment Act. Section 11 provides: (i) that upon the death of the allottee, the property will be held in trust for "his heirs according to the laws of the State or Territory where such land is located," and (ii) that "the law of descent and partition in force in the State or Territory where the lands may be situated shall apply thereto."

Because the state law specified by Congress is subject to amendment by the state legislature at any time, the incorporation of state law into Section 11 of the Sioux Allotment Act obviously cannot be read to confer on Sioux allottees a contractual immunity from changes in the law of descent. See U.S. Br. 39 n.22. And because state law does not apply of its own force to lands held in trust for Indians, but instead applies only to the extent it has been incorporated in an Act of Congress that is itself subject to amendment at any time.[10] the incorporation of state law in Section 11 likewise cannot be read to have contracted away *Congress's* plenary authority to enact legislation that directly regulates the descent of Indian property and thereby supersedes the rules of descent prescribed by state law.[11] Section 207 of the Indian Land Consolidation Act is just such legislation. The language of Section 11 therefore makes it particularly clear that it does *not* confer contractual or vested rights on allottees of the Pine Ridge and Rosebud Reservations, but instead "merely declares a policy [regarding the descent of Indian allotments] to be pursued until the legislature shall ordain otherwise" (*National Railroad Passenger Corp.*, 470 U.S. at 466).

b. Appellees nevertheless assert (Br. 17-18, 21-23) that the term "heirs" in Section 11 and the supposed "bargain" embodied in the 1889 Act as a whole conferred on the Sioux allottees an absolute right not only to have their interests in allotments pass

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[10] See *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 556, 561 (1983) (discussing the disclaimer clause in Section 4 of the Enabling Act of Feb. 22, 1889, ch. 180, 25 Stat. 676, by which South Dakota was admitted to the Union); *South Carolina* v. *Catawba Indian Tribe of South Carolina*, No. 84-782 (June 2, 1986), slip op. 9-11; *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 240-241 n.13 (1985).

[11] Congress has enacted numerous such statutes. See, *e.g.*, Act of Feb. 28, 1891, ch. 383, § 5, 26 Stat. 795, 25 U.S.C. 371 (providing that children born of the cohabitation of a man and woman according to Indian custom shall be regarded as legitimate); Act of June 25, 1910, ch. 431, § 2, 36 Stat. 856, 25 U.S.C. 373 (permitting disposal of allotments by will); IRA of 1934, § 4, 25 U.S.C. 464 (limiting persons to whom restricted property may be transferred or descend); Act of Nov. 24, 1942, ch. 640, § 1, 56 Stat. 1021, 25 U.S.C. 373a (escheat to tribe of restricted estate if Indian dies intestate without heirs). See also U.S. Br. 7-8 n.8 (listing statutes that limit descent of property on particular reservations).

to their children or other family members by intestate succession, but also to dispose of such interests by will. There is no support for that proposition. The reference to "heirs" in Section 11, like that in Section 5 of the General Allotment Act, was intended to subject the descent of allotments only to the state law of intestate succession. See F. Cohen, *Handbook of Federal Indian Law* 230-231 (1942)). Moreover, Section 11, like Section 5 of the General Allotment Act, broadly provides that any "conveyance" of allotted lands prior to the expiration of the trust period "shall be absolutely null and void" (25 Stat. 891). That prohibition applies to the disposition of an allotment by will. See *Blundell* v. *Wallace*, 267 U.S. 373, 375 (1925); *LaMotte* v. *United States*, 254 U.S. 570, 579 (1921); *Taylor* v. *Parker*, 235 U.S. 42, 43-44 (1914); *In re House's Heirs*, 112 N.W. 27, 28-29, 132 Wis. 212, 215 (1907); *United States ex rel. Zane* v. *Zane*, 69 S.W. 842, 845 (Indian Terr. 1902); cf. *Hayes* v. *Barringer*, 168 F. 221 (8th Cir. 1909). It was not until the Act of June 25, 1910 (ch. 431, § 2, 36 Stat. 856, 25 U.S.C. 373) that Congress lifted that prohibition and conferred on Indians the power to dispose of a trust or restricted allotment by will. *Blanset* v. *Cardin*, 256 U.S. 319, 323-327 (1921); *Tooahnippah* v. *Hickel*, 397 U.S. 598, 613 (1970) (Harlan, J., concurring). Thus, to the extent that appellees' assertion of an absolute contractual right to pass property at death rests on the notion that Section 11 conferred on the Sioux allottees and their descendants the right to dispose of allotments by will, their submission is especially unmeritorious.[12]

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[12] Appellees contend (Br. 18 & n.11, 22-23) that the Sioux were assured when the 1888 version of the Sioux Allotment Act was explained to them by the Commission sent to the Sioux (see page 14, *infra*) that they could dispose of property by will. But in support of that proposition, appellees cite only a single passage from the Commission's proceedings: a portion of a statement by Rev. Cleveland, one of the Commissioners. See Appellees' Br. 18 n.11, quoting S. Doc. 17, 50th Cong., 2d Sess. 139 (1888). Appellees' selection of the two sentences upon which they rely is misleading. The preceding three sentences, not quoted by appellees, in fact make clear that Rev. Cleveland stated only that the allottee could specify how his property would be divided among his children *after* he was issued a patent in fee. Rev. Cleveland made clear that prior to that time, while the property remained in trust status, the property would descend to the allottee's heirs "according to law" (*ibid.*). – *i.e.*, according to the law of intestate succession.

c. Appellees' construction of Section 11 is still further undermined by this Court's decision in *Jefferson* v. *Fink*, 247 U.S. 288, 293-294 (1918). In *Fink*, an allotment had been issued pursuant to a 1902 statute affecting the Creek Indians that provided for the descent of Creek allotments to be governed by Arkansas law. The Court explained that this descent provision was consistent with the general "policy of Congress," which was established by the specifications in Section 5 of the General Allotment Act that property would be held in trust for a deceased allottee's "heirs according to the laws of the State" and that "the law of descent and partition in force in the State" shall apply to the allotment. 247 U.S. at 290, 294. In 1908, Congress amended the 1902 Creek statute to provide that allotments thereafter would descend according to the laws of the newly admitted State of Oklahoma. In *Fink*, the Court rejected the claim that the 1902 Act had created a vested or contractual right to have allotted land descend to specified persons in accordance with Arkansas law (247 U.S. at 294):

> What was said about the rules of descent was purely legislative, not contractual; and its presence in the act gave it no effect that it would not have had as a separate enactment. Like other rules of descent it was subject to change by the law-making power as to any land not already passed to the heir by the death of the owner.

It follows a fortiori from *Fink* that appellees' essentially identical contractual claim must be rejected. The Creek statute at issue in *Fink* actually incorporated an agreement that already had been concluded with the Creeks (see Act of June 30, 1902, ch. 1323, 32 Stat. 500 *et seq.*), and yet the Court still held that no contractual rights were conferred by the heirship provisions of the Act. The Sioux Allotment Act, by contrast, neither enacts a previously concluded agreement with the Indians nor takes the form of a negotiated agreement. See pages 14-16, *infra*. Moreover, unlike the descent provisions of the Creek statute, Section 11 of the Sioux Allotment Act incorporates verbatim the language of Section 5 of the General Allotment Act, upon which the Court relied in *Fink*. Section 11 therefore must also be read merely to state the "policy of Congress" (247 U.S. at 290, 294), not to confer contractual rights.

d. Appellees fare no better in their attempt (Br. 13-17, 22) to draw from the background of the Sioux Allotment Act an implied contractual immunity to the operation of Section 207 of the Indian Land Consolidation Act of 1983. Although Section 28 of the Sioux Allotment Act (25 Stat. 899) provided that it would take effect only with the consent of three-fourths of the adult male Sioux Indians,[13] the language of the Act in general and of Section 11 in particular was not the product of detailed negotiations between the United States and the Sioux that could form the basis for the sort of contractual claim appellees advance. Congress instead unilaterally drew the relevant language of Section 11 directly from Section 5 of the General Allotment Act, which was *not* made contingent upon the consent of the affected tribes and therefore cannot be characterized as a "bargain" that includes a contractual immunity to regulation. Sisseton-Wahpeton Amicus Br. 2, 8-9; cf. R. Strickland, *et al.*, *Felix Cohen's Handbook of Federal Indian Law* 131 (1982). These origins of Section 11 weigh heavily against the implication of a permanent immunity to governmental regulation of the descent of restricted allotments.

The other circumstances surrounding the enactment of the Sioux Allotment Act likewise cut against any such implication. That Act was not Congress's first attempt to secure the Sioux's consent to the division and allotment of the Great Sioux Reservation. Congress had enacted a similar statute a year earlier (Act of Apr. 30, 1888, ch. 206, 25 Stat. 94 *et seq.*), but the Sioux had failed to give the requisite three-fourths consent after the 1888 Act was presented to the Indians at each of the agencies on the Reservation by a specially appointed Commission. S. Doc. 17, 50th Cong., 2d Sess. 19 (1888). The Commission's report states that the Sioux's principal objections to the 1888 Act included that "they had not been consulted when the Act was framed" and that the Commissioners "had not come to bargain with them, but were to present for their acceptance or rejection an act of Congress which already had received the approval of the President" (*id.* at 4). Because the relevant provisions of Section

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[13] This consent requirement was included to comply with Article XII of the Treaty of Fort Laramie, Apr. 29, 1868, 15 Stat. 639. See *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. at 589 & n. 5.

11 of the 1888 Act (25 Stat. 98) were identical to those in Section 11 of the 1889 Act (25 Stat. 891), these statements in the Commission's report reinforce the conclusion that Section 11 does not embody a bargained-for immunity to the reasonable governmental regulation prescribed by Section 207 of the Indian Land Consolidation Act.

Moreover, although the Commission's 1888 report recites the Indians' opposition to other provisions of the 1888 Act (especially to the size of the allotments for heads of household and the price to be paid for surplus lands (S. Doc. 17, *supra*, at 4, 7)), there is no mention in the Commission's report of any objection to Section 11 (see *id.* at 2-30). Similarly, although Congress framed the 1889 Act to meet the Indians' objections to the 1888 Act (see U.S. Br. 41-42), it made no changes in the operative language of Section 11 (see U.S. Br. 42 & n.25). These circumstances obviously furnish no support for appellees' contention that Congress conferred on the Sioux allottees and every generation of their descendants a unique and permanent contractual immunity from legislation such as Section 207. Far less do these circumstances constitute the clear and unequivocal expression of congressional intent that would be necessary to overcome the presumption that a statutory provision such as Section 11 of the Sioux Allotment Act is not intended to create contractual rights.

Nor do the few statements by members of the two Commissions to the Sioux that appellees have excerpted from the hundreds of pages of the Commissions' proceedings (see Br. 16-17, 22) overcome that presumption. The Commissioners stressed to the Sioux that they had no authority to bargain with the Sioux on behalf of Congress, but could only present the 1888 and 1889 Acts to be accepted or rejected by the Sioux. See page 14, *supra*; U.S. Br. 42-43. In any event, the Commissioners had no authority to contract away Congress's power to regulate the descent and distribution or restricted Indian property, and they did not purport to do so.

As the court of appeals observed, the "references to heirs and children in conjunction with land," upon which appellees rely, were "relatively sparse" (J.S. App. 12a n.10). Significantly, moreover, the references appellees quote (Br. 16-17, 21) all respond to the Indians' concern that their lands might be taken

from them by non-Indians (S. Doc. 17, *supra*, at 108, 145; S. Doc. 50, 51st Cong., 1st Sess. 54, 85, 111 (1889))—a possibility with which the Sioux were painfully familiar by virtue of their recent loss of the Black Hills in 1877. See *United States* v. *Sioux Nation*, 448 U.S. at 376-384. The quoted passages simply reflect the premise of the Sioux Allotment Act that acceptance of land in severalty would furnish the Sioux with essential protection against the loss of all of their land to non-Indians. Section 207 of the Indian Land Consolidation Act is fully consistent with those assurances, because it does not cause land to pass out of Indian ownership. It instead addresses the distinct problems created among the Indians themselves as a result of the extreme fragmentation of ownership of allotments that remain in Indian hands. The passages cited by appellees have no bearing on that problem, or on Congress's chosen remedy of providing for the restoration of de minimis interests to the tribe itself when the individual Indian owner has declined to make appropriate alternative arrangements. Accordingly, nothing in the Commissions' explanations of the Sioux Allotment Act undermines the validity of Section 207 as applied to the Pine Ridge and Rosebud Reservations—even if the language of Section 11 were thought to be sufficiently ambiguous to justify some reliance on those explanations. Compare *South Carolina* v. *Catawba Indian Tribe*, slip op. 12; *Oregon Dep't of Fish & Wildlife* v. *Klamath Indian Tribe*, No. 83-2148 (July 2, 1985), slip op. 19.

It is significant as well that when the Commissions presented the Act to the Sioux, it was anticipated that the allotments would pass into fee status at the expiration of the 25-year trust period. Congress, the Commissions, and the Sioux therefore would have had no occasion to consider the possible need for legislation almost 100 years later to address problems created by the repudiation of the very allotment policy on which the Sioux Allotment Act was premised. Thus, even if there was some contractual element to Section 11 within the context of its original enactment, Congress is not foreclosed from enacting legislation in the drastically changed and unanticipated consequences that now obtain, long after the original 25-year trust period has expired. Cf. Restatement (Second) of the Law of Contracts § 261 (1979). By contrast, in *Choate* v. *Trapp*, 224 U.S. 665 (1912),

upon which appellees principally rely (Br. 20-21, 23-28), Congress sought to repeal an express tax exemption during the original 25-year trust period for which it was guaranteed.

Appellees' reliance (Br. 22, 24) on the principle that ambiguities should be resolved in favor of the Indians and as the Indians would have understood them is equally misplaced. There is no ambiguity in Section 11, especially not one that would overcome the strong presumption against reading a statute to create contractual rights to be free of governmental regulation; nor is there reason to believe that the Sioux understood otherwise. These rules of construction are of little relevance here in any event, because Section 207 itself was enacted for the benefit of the Indians, and it operates to transfer affected property interests to the tribe, not to non-Indians. Compare *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 655 n.7 (1976).[14]

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[14] Appellees observe in the statement portion of their brief that Section 207 did not provide any grace period, which appellees contend would have permitted the decedent owners of the fractional interests at issue in this case to arrange their affairs in a manner that would avoid escheat of their interests (*e.g.*, by selling or giving away their interests, applying for partition, or acquiring additional interests). See Br. 3, 6, citing *Texaco, Inc.* v. *Short*, 454 U.S. 516 (1982). To the extent that appellees intend by their citation to *Short* to raise a due process objection to the application of Section 207 to the interests in allotments involved in this case, we note that appellees raised no such claim in the district court or court of appeals or in their Motion to Affirm in this Court. Nor do appellees urge in the argument portion of their brief that the judgment below should be affirmed on due process grounds. Accordingly, there is no due process issue properly before this Court.

In any event, appellees do not contend that the Secretary was required to furnish personal notice of the enactment of Section 207 to every owner of a fractional interest in an allotment (cf. *Watkins* v. *Parker*, No. 83-1660 (June 4, 1985)), although the Secretary's implementing instructions did urge all Area Directors and Reservation Superintendents "to provide all Indian landowners under their jurisdiction with notice of its effects" (J.S. App. 39a). Moreover, because Section 207 represents an exercise by Congress of the established power of the sovereign to regulate and direct a particular disposition of property at death, and because the descent of property typically is governed by the law in effect at the time of death, no grace period was constitutionally required. And even if the decedents might have insisted upon some grace period following the enactment of Section 207, it is by no means clear that appellees would have a valid claim. As we have explained (see note 7, *supra*), some

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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(perhaps many) decedents presumably would have accepted the consequence that their de minimis interests would escheat to the tribe and would have declined to make alternative arrangements for that reason. The heirs and devisees of such an owner have no standing to challenge his declination. In addition, in this case, appellees' decedents died between March 18 and June 23, 1983, between two and five months after Section 207 was signed into law on January 12, 1983. There is no indication that it would have been impracticable for the decedents to dispose of their interests by gift or sale or to purchase other interests—or at least to take steps to those ends—during the period preceding their death. Decedent Cross, for example, executed a will disposing of her property to her minor children on March 16, 1983, one week before her death. See note 8, *supra*.

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